STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP001586-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Cir. Ct. Case No.
2016CM002512

JUSTICE G. ARMSTEAD,

Defendant-Appellant.

Appeal From Decision and Final Order Denying Post-Conviction Motion Entered July 26, 2017,
Milwaukee County Circuit Court,
The Honorable Jean M. Kies, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. ARMSTEAD'S INVOLUNTARY MEDICATION ORDER SHOULD BE REVIEWED; HIS ISSUES ARE LIKELY TO BE REPEATED AND ARE OF PUBLIC IMPORTANCE.[1]

The State challenges Armstead's assertion that his involuntary medication issue is likely to be repeated, and would otherwise evade review – due to the expiration of the statutorily-limited, 6-month conditional release and involuntary medication order during his appeal (Response Brief at 6). The State's challenge is unfounded.

First, the State overlooked the circuit court's own references to Armstead's history of repeated commitments and hospitalizations. "[Y]ou have *an eleven-year history* of schizophrenia, . . . you have frequent hospitalizations in your past . . . ." (R49:33) (Emphasis added.) And even the State referred in its brief to "Armstead's *history* of non-compliance with his medication regime . . . ." (Response Brief at 10) – which is a concession that the instant case was not a single occurrence in which Armstead was confronted for the first and only time with an involuntary medications order. (Emphasis added.)

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[1] The order of the two arguments raised by Armstead in his opening brief was reversed in the State's response brief. For continuity purposes, Armstead's reply brief has adopted the State's rearranged order of the issues so that the mootness issue is addressed first.

Second, there are new developments (as reported on CCAP)[2] in Armstead's two new cases (which the State had argued were irrelevant) (Response Brief at 6). The CCAP entries in Milwaukee County Circuit Court Case Nos. 2017CF4142 and 2017CF5110 (quoted here) clearly state that on February 8, 2018 Armstead was subjected, once again, to involuntary medications orders (one for each case):

> Court found the defendant is not competent to refuse psychotropic medication or treatment due to mental illness because the defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting psychotropic medication or treatment.

Third, while the medications order in this case expired and discharge from conditional release occurred after the filing of this appeal (R37; A. App. 114), *Melanie L*. declared that such facts actually supply supporting reasons to take review. "Moreover, interpreting the 4.b. competency standard is likely to evade appellate review in many instances because the order appealed from will have expired before an appeal is completed." *In re Melanie L*., 2013 WI 67, ¶ 80, 349 Wis.2d at 185, 833 N.W.2d at 626.

The State also briefly argues (Response Brief at 6) that Armstead does not raise an issue of public importance that would justify an exception to a finding of mootness. On the contrary, the issue raised here is extremely important. The State contends that the psychiatric opinion in this case, that Armstead lacked "a complete, *rational understanding* of the

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[2] Armstead noted in his opening brief that this Court may take judicial notice of the CCAP posts regarding Armstead's cases under Wis. Stat. § 902.01. See, e.g., *Kirk v. Credit Acceptance Corp*., 2013 WI App 32, ¶ 58, 346 Wis.2d 635, 663, 829 N.W.2d 522, 535; *Westport Ins. Corp. v. Appleton Papers Inc*., 72010 WI App 86, ¶ 82, 327 Wis.2d 120, 170, 87 N.W.2d 894, 919.

advantages and disadvantages" of taking the medication, was sufficient to establish grounds under the standard in Wis. Stats. § 971.16(3)(b), to support a finding that Armstead was "substantially incapable of applying" an understanding.

In essence, the State is arguing that the psychiatric opinions here, that Armstead did not have either a "complete" or "rational" understanding, and that instead he had "irrational perceptions about the disadvantages of his medication" (Response Brief at 10), were sufficient to meet the standard of being "substantially incapable of applying" an understanding set out in Wis. Stats. § 971.16(3)(b). But the State's references to the psychiatrist's opinions instead would go to the standard in Wis. Stats. § 971.16(3)(a), if a defendant is "incapable of expressing an understanding of the advantages and disadvantages." (Emphasis added). The State has conflated the two standards and now contends that a psychiatric opinion that goes to subd. (3)(a), that the NGI acquittee *does not understand* the pro's and con's of the medications, is also sufficient to meet the standard under subd. (3)(b), that the NGI acquittee *is substantially incapable of applying* an otherwise adequate understanding. This is an issue of obvious public importance. The Court in *Melanie L.* so held with regard to the counterpart provision in Wis. Stats. § 51.61(1)(g)4.b. See, *In re Melanie L.*, 2013 WI 67, ¶80, 349 Wis. 2d 148, 185, 833 N.W.2d 607, 626. The circuit court relied only on subd. (3)(b) because the State conceded that it was not relying on subd. (3)(a) so that its position in this court contradicts its position below.

II. THE OPINION TESTIMONY DID NOT SUPPLY SUFFICIENT EVIDENCE THAT ARMSTEAD WAS INCAPABLE OF *APPLYING* AN UNDERSTANDING OF THE ADVANTAGES, DISADVANTAGES, AND ALTERNATIVES TO MEDICATION TO HIS MENTAL ILLNESS IN ORDER TO MAKE AN INFORMED CHOICE.

One of the State's arguments (Response Brief at 8-10) overlooked the fact that Dr. Pankiewicz testified that Armstead's perceptions of the medication side effects, were "wholely [sic] not associated with the medicine." (R49:10). This opinion was insufficient to support the circuit court's involuntary medications order because it was contradicted both by the doctor's own observations, by Armstead's testimony, and by accepted medical literature, including the Invega manufacturer's literature. Dr. Pankiewicz's own report described Armstead's complaints about the effects of the medication, which included difficulty in breathing, lock jaw, and tongue swelling, that led to numerous emergency room admissions. These are negative side effects (presumably qualifying under the statutory category of "disadvantages") widely associated with psychotropic medications, including Invega.

The Court in *State ex rel. Jones v. Gerhardstein*, 135 Wis.2d 161, 175, 400 N.W.2d 1, 6 (Ct.App.1986) noted that psychotropic medication side effects may include anything from serious neurological disorders to increased risk of heart attack. *Id.* at 175, n. 3, 400 N.W.2d at 6-7. Hence, Armstead's testimony that he occasionally experienced what he perceived to be "life-threatening" side effects (which the State appears to contend showed that he "skewed" his understanding of the drug's effects) would not be irrational.

In fact, Invega's negative side effects include tardive dyskinesia (as described in detail in Armstead's opening brief at 9-11), and also tachycardia, and akathisia. Tachycardia, which is commonly described in medical dictionaries, is a fast or irregular heart rhythm, usually more than 100 beats per minute and as many as 400 beats per minute that can cause dizziness, lightheadedness, or a fluttering in the chest, which could rationally be perceived as "life-threatening." Akathisia is similarly described as a movement disorder characterized by a feeling of inner restlessness and inability to stay still, in which the legs are most prominently affected.

Another of the State's arguments (Response Brief at 8) was rejected in *Melanie L.* The State contends that the psychiatric expert's view that "Armstead had such irrational perceptions about the disadvantages of his medication" that he was substantially incapable of applying his understanding, was sufficient to sustain the court's order. This contention posits that Armstead was not capable of applying his understanding of the drug effects to his advantage; in short, in the psychiatrist's opinion, Armstead would have been wiser to take the medication than not; that is, Dr. Pankiewicz was stating that by taking the medication Armstead could at least experience the advantages of the medication; it would be a better, more advantageous choice.

This is the same error that arose in *Melanie L.*, where the expert's opinion was deemed insufficient because the doctor only determined that "she is unable to apply such understanding to her advantage and she is considered to be not competent to refuse psychotropic medication…." There, the expert had testified, "I do not think that she's capable of applying the benefits of the medication to her advantage.". *In re Melanie L.*, 2013 WI 67, ¶30, 349 Wis. 2d 148, 163-64, 833 N.W.2d 607, 615.

> In particular, the medical expert's terminology and recitation of facts did not sufficiently address and meet the statutory standard. Medical experts must apply the standards set out in the competency statute. An expert's use of different language to explain his or her conclusions should be linked back to the standards in the statute.

In re Melanie L., 2013 WI 67, ¶¶ 96-97, 349 Wis.2d 148, 191, 833 N.W.2d 607, 629.

Finally, the circuit court's reasoning was insufficient, when coupled with the expert evidence, to support the medications order. The court's description of the evidence not was not consistent with a finding that there was clear and convincing evidence showing that Armstead was incapable of applying an understanding of the advantages, disadvantages, and alternatives to medication to his mental illness in order to make an informed choice.

The circuit court conceded on the record that it was "a hard decision" to conclude that Armstead was incompetent to refuse medication (R49:33). If indeed it was a difficult decision for the court to conclude that Armstead was incompetent to refuse the medications, then the evidence was neither "clear" nor "convincing" that he was incompetent to make that decision. The court's observations about Armstead's own insights into the medications explained its uncertainty. The court's appreciation of Armstead's progress in his understanding of the pro's and con's of the medications undercut its later conclusion: "I recognize that you have been doing really good. . . . You seem to have learned what the advantages and disadvantages are of taking the medication and you seem to appreciate that. . . . I think you're coming to terms with it and learning maybe what the benefits or advantages are of medication." (R49:33).

CONCLUSION

Armstead respectfully requests that this Court reverse the circuit court's involuntary medication order by reaching the same conclusion as did the Supreme Court in *Melanie L.* because the evidence "did not overcome [Armstead's] presumption of competence to make an informed choice to refuse medication."

Dated this 16th day of February, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,674 words.

Dated this 16th day of February, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of February, 2018.

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